BRDB DEVELOPMENTS SDN BHD
v. MENTERI KEWANGAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-293-08-2021]
4 AUGUST 2023

Abstract – *(i) Section 135 of the Income Tax Act 1967 ('ITA') does not envisage the Minister of Finance giving directions to the Director General of Inland Revenue to set aside assessments as such power is explicitly vested in the Special Commissioners of Income Tax or the High Court; (ii) Section 127(3A) of the ITA does not envisage granting exemptions in respect of illegal and/or unlawful tax.*

ADMINISTRATIVE LAW: *Judicial review – Leave – Application for – Income tax assessment – Director General of Inland Revenue ('DGIR') informed applicant that disposal of lots subject to tax under s. 4(a) of Income Tax Act 1967 ('ITA') and not Real Property Gains Tax Act 1976 – Applicant applied to Minister of Finance ('Minister') to give DGIR directions under s. 135 of ITA and/or to exempt taxes raised under s. 127(3A) of ITA – Whether Minister's non-response rejection of application – Seeking order that Minister exercise powers to give DGIR directions and/or set aside or exempt tax – Whether relief prayed for in nature of certiorari or mandamus – Whether criteria for mandamus satisfied*

REVENUE LAW: *Income tax – Assessment – Director General of Inland Revenue informed applicant that disposal of lots subject to tax under s. 4(a) of Income Tax Act 1967 ('ITA') and not Real Property Gains Tax Act 1976 – Whether ss. 135 and 127(3A) of ITA applicable to set aside or exempt unlawful taxes raised against taxpayer*

The applicant, a company involved in property development and investment, had acquired and sold three lots. The Director General of Inland Revenue ('DGIR') had initially issued notices of assessment stating that the gains from the disposal of the lots were subject to real property gains tax ('RPGT') under the Real Property Gains Tax Act 1976 ('RPGTA'). However, following an audit finding, the DGIR later informed the applicant that the disposal of the lots were subject to tax under s. 4(a) of the Income Tax Act 1967 ('ITA'), not the RPGTA. The DGIR proceeded to issue the notice of non-chargeability and Form J. The applicant applied for leave to challenge the assessments by way of a judicial review application but the application was dismissed. The applicant then applied to the Minister of Finance ('Minister'), for the Minister to give the DGIR directions, under s. 135 of the ITA, and/or to exempt the taxes raised, under s. 127(3A) of the ITA. The Minister did not respond and the applicant treated the non-response as a rejection of its application. Hence, the present application

for leave to commence judicial review where the applicant sought an order that the Minister exercises his powers to give the DGIR directions and/or to set aside or exempt the tax raised against the applicant. Objecting to the application, the respondent argued that: (i) the relief prayed for was in the nature of *mandamus* but the basic criteria for *mandamus* was not satisfied; and (ii) ss. 135 and 127(3A) of the ITA were not applicable to set aside or exempt unlawful taxes raised against a taxpayer as that power was expressly designated by Parliament to the Special Commissioners of Income Tax ('SCIT') by way of an appeal.

Held (dismissing application):

(1) The Minister did not exercise his powers or, in other words, did not make any decision under ss. 135 and/or 127(3A) of the ITA as requested by the applicant. Further, the applicant sought declarations in the form framed as though the Minister had made a decision on the requests made which were, in pith and substance, against the assessments made by the DGIR. The declarations would only be proper against the DGIR and was groundless against the Minister who made no decision. The grounds of review were an all-out assault on the decision of the DGIR. (paras 15 & 16)

(2) Leave to commence judicial review proceedings, to challenge the decision of the DGIR, was dismissed by this court and there was no appeal against that decision. Thus, the only body that was empowered by the Parliament to make the appropriate 'directions' against the unlawful and arbitrary exercise of power by the DGIR or to set aside the assessment as being illegal, *ultra vires* and in excess of jurisdiction, as alleged by the applicant, was the SCIT by way of an appeal. The applicant's other avenue of judicial review against the DGIR for the order of *certiorari* and/or declarations was already heard and dismissed by the High Court. Since the Minister did not make any decision, the issue of failing to give any reason did not arise and such a complaint was clearly 'frivolous and vexatious' and an abuse of the process of the court. No success could be envisaged on this ground. (paras 16 & 17)

(3) The opening words of the principal relief sought were 'an order for the respondent (Minister) to exercise his power'. The 'power' referred to is housed in ss. 135 and 127(3A) of the ITA. The words were compelling words and were directed to the Minister to exercise the power in the manner dictated by the applicant. The relief sought, as it was worded, was, in pith and substance, an order in the nature of *mandamus*; it was certainly not an order for *certiorari*. An order of *certiorari* is to quash the legal effect of a decision and this was not made out by the words employed in the principal relief sought. What was prayed for was to exercise power. What was sought, on the other hand, was an order in the nature of *mandamus* which could not, in law, be granted on the face of what had been pleaded by the applicant. (paras 18 & 19)

(4) The applicant was claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the SCIT. As such, s. 127(3A) of the ITA is only applicable where there is liability to pay lawfully assessed tax. Therefore, the exemption sought in the instant case was something that the Minister had no power of doing. Since there was no power to do what was requested of the Minister, there was no basis to seek the declarations sought against the Minister. There was no arguable case for further investigation at the substantive stage. (paras 43 & 44)

Case(s) referred to:

ALF Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936 CA ***(refd)***

Council Of Civil Service Unions v. Minister For Civil Service [1984] 3 All ER 935 ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Gra Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (2012) MSTC 10-038 ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***

Lim Foo Yong Sdn Bhd v. The Comptroller-General Of Inland Revenue [1986] 2 CLJ 182; [1986] CLJ (Rep) 1 PC ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Peguam Negara v. CMMT Investment Ltd (Civil Appeal No: W-01(IM)-575-10-2021) (Unreported) ***(refd)***

R v. Central Professional Committee for Opticians [1949] 2 All ER 519 ***(refd)***

Re Bukit Sembawang Rubber Co Ltd & Sembawang Estates Ltd [1961] 1 LNS 102 ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2018] 2 CLJ 762 CA ***(refd)***

Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi [2015] 9 CLJ 110 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Zainal Hj Nasiruddin v. The Registrar Of Societies [2012] 1 LNS 939 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Income Tax Act 1967, ss. 4(a), 99, 100, 101, 102, 127(3A), 135, Chapter 2, PartsVI, IX, Schedule 5, para 34

Judges' Code of Ethics 2009, s. 13

Rules of Court 2012, O. 53

Other source(s) referred to:
MP Jain, *Administrative Law of Malaysia and Singapore,* 4th edn, p 615

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JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 8 May 2023, I dismissed the application for leave to commence judicial review proceeding by the applicant, BRDB Developments Sdn Bhd against the Minister for Finance ("the Minister") for the following principal reliefs (as stated in encl. 1):

(i) an order that the Minister exercise his powers under s. 135 and/or s. 127(3A) of the Income Tax Act 1967 ("ITA") to set aside or exempt the notification of non-chargeability for the Year of Assessment ("YA") 2017 and notice of assessment ("Form J") for the Year of Assessment ("YA") 2018 both dated 5 August 2020 ("the impugned assessments") raised against the applicant by the Director General of Inland Revenue ("DGIR") for the sum of RM7,399,023.92 on the ground that the impugned assessments are illegal, void, unlawful and/or in excess of authority, irrational, and/or unreasonable and resulted in a denial of the applicant's legitimate expectation;

(ii) a declaration that the Minister failed to appreciate that the DGIR is bound by and shall give effect to the decisions of the superior courts in *ALF Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 3 CLJ 936; [2005] 3 MLJ 937 and *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 which held that there must be an intention to trade on the part of the taxpayer for a gain to fall under s. 4(a) of the ITA and that the applicant's gains from the disposal of its investment properties are not subject to income tax under the ITA; and

(iii) a declaration that the gains received by the applicant from the disposal of its investment properties, namely: (a) Lot 4739, Block 18, Salak Land District; (b) Lot 1691 Mukim Kluang, Daerah Kluang and (c) Lot 49343, Mukim Pulai Daerah Johor Bahru ("the said lots") should not and cannot be subject to income tax under s. 4(a) of the ITA as the applicant did not have the intention to trade.

[2] My reason for the decision is that the application is frivolous and vexatious for the reasons stated below.

The Background Facts

[3] The facts are averred to in the affidavit verifying facts in support of the instant application for leave. It is stated that the applicant is a dual-purpose company engaging in property development and property investment. The applicant had acquired the said lots and on 13 June 2017 sold Lot 4739 to Lau Chai Hoe and Evelyn Hii San San, on 30 August 2017 sold Lot 1691 Hektar Berlian Sdn Bhd and on 19 October 2017 sold Lot 49343 to Yan Chaoxiaong.

[4] The DGIR had issued notices of assessment stating that the gains from the disposal of the lots were subject to real property gains tax ("RPGT") under the Real Property Gains Tax Act 1976 ("the RPGTA") *vide* the following:

(i) notice of assessment (Form K) dated 9 July 2018 for Lot 4739;

(ii) notice of assessment (Form K) dated 24 May 2018 and notice of reduced assessment (Form KR) dated 20 July 2018 for Lot 1691; and

(iii) notice of assessment (Form K) dated 26 July 2018 for Lot 49343.

[5] Two years later, pursuant to an initial audit finding on 13 May 2020, the DGIR informed the applicant that the disposals of the lots were subject to tax under s. 4(a) of the ITA and not under the RPGTA. In a letter dated 10 June 2020, the applicant gave its reasons why the gains from the disposal from the said lots 28 October 2020 ought not to be subjected to s. 4(a) of the ITA. The DGIR disagreed with the applicant as stated in a letter dated 8 July 2020. Undeterred, the applicant in a letter dated 24 July 2020 explained further its position and the current position of the law as to why the gains from the disposal of the said lots were subject to the RPGTA.

[6] The DGIR maintained its position and the impugned assessments, and proceeded to issue the notice of non-chargeability and Form J. On 18 August 2020, the applicant applied for leave to challenge the impugned assessments by way of a judicial review application. That application for leave was dismissed on 28 May 2021. The facts show that after the dismissal of the application for leave, the applicant persuaded this court to grant an interim stay of all further proceedings for four months until 28 September 2021.

[7] It appeared that, the applicant on 27 July 2021, sent an email to the Minister attaching a letter with the same date applying to the Minister to give the DGIR directions under s. 135 of the ITA and/or to exempt the taxes raised under s. 127(3A) of the ITA. The Minister did not respond to this letter. The applicant treated the Minister's action in failing to respond as a decision to reject its application for the said directions and/or exemption of the taxes raised against it.

[8] On 17 August 2021, the applicant filed the instant application for leave to commence judicial review proceedings for an order that the Minister exercise its powers to give the DGIR directions under s. 135 of the ITA and/or to set aside or exempt the tax raised against the applicant.

The Grounds Of Review

[9] The grounds in support of the reliefs sought in the application were stated in the O. 53 statement as follows:

(i) the Minister's decision is tainted with illegality, *ultra vires*, unlawful and/or in excess of authority for the following reasons:

(a) the Minister failed to realise that the DGIR ignored the fact that the applicant is a dual-purpose company. A property development company may also be an investment holding company. The mere fact that a company is a property development company cannot negate its intention to also be an investment holding company (see *Lim Foo Yong Sdn Bhd v. The Comptroller-General Of Inland Revenue* [1986] 2 CLJ 182; [1986] (Rep) 1; [1986] 2 MLJ 161);

(b) the Minister failed to acknowledge and appreciate that the DGIR ignored the cases of *ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 793 and *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 which established that an intention to trade on the taxpayer must exist for the DGIR to subject the gains from a disposal to s. 4(a) of the ITA. An applicant cannot be said to have been trading when dealing with its investment property;

(c) the Minister failed to realise that the DGIR did not take into consideration that although there was an application for approval of development order prior to the disposal, this does not alter the fact that the applicant had an intention to hold the said lots as an investment. The DGIR did not take into cognisance of the case of *Gra Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2012) MSTC 10-038 which has clearly pointed that the mere fact that there was a master development application did not change the fact that the taxpayer had intended to hold the land as an investment asset. It was also held in *Lower Perak* (*supra*) that a landowner may be merely taking steps to enhance the value of its property and not trading;

(d) the Minister failed to take into consideration that the DGIR ignored the fact that the applicant held Lot 1691 for nearly 40 years whereas Lot 4739 and Lot 49343 were held for more than 20 years prior to their disposal;

(e) the Minister failed to take into consideration that the DGIR did not realise that the mere fact that the said lots are situated near the city and therefore have high commercial value is not conclusive evidence that the applicant has the intention to make profits; and

(f) the Minister failed to realise that the DGIR failed to take cognisance that the said lots have been classified and treated as non-current asset in the applicant's audited accounts when they were disposed.

(ii) the Minister's decision is irrational and/or unreasonable for the following grounds:

(a) the Minister's decision is liable to be quashed on the ground that it is so unreasonable that no reasonable person would have come to that decision. This is especially so when the Minister had failed to give any valid justification, reason or basis for its decision;

(b) there is good basis for the applicant to believe that the Minister had exercised his authority arbitrarily and/or mechanically without applying his mind to the facts and circumstances of the case. Nothing in the Minister's decision suggests that the Minister had given even the briefest of thought to the explanation contained in the applicant's letter dated 27 July 2021;

(c) the applicant at all material times acted in good faith, gave full co-operation, made full and frank disclosure and obtained professional advice in managing its finances and tax affairs;

(d) the decisions of the superior courts and this court in relation to the interpretation and construction of legislation and case law are part of the laws of Malaysia and binding on the Minister. The Minister clearly failed to take cognisance of those decisions; and

(e) The Minister failed to appreciate and to give effect to the true effect and application of the ITA amounts to a clear contravention of art. 96 of the Federal Constitution.

(iii) the Minister's decision was made without having any regard to the legitimate expectations of the applicant as the Minister failed to consider the decisions of the superior courts in relation to the interpretation and construction of legislation and which disregard constitutes a denial of the legitimate expectation of the applicant.

The Test To Be Applied At Leave Stage

[10] This brings me to the duty of the judge hearing an application for leave. To obtain leave of court to commence judicial review, the established test is aptly described by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 in the following words:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though *ie*, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[11] The test in *WRP Asia Pacific Sdn Bhd* envisages three categories where leave of court will be refused. The first is where the application is found to be 'frivolous and vexatious'. In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 and *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2018] 2 CLJ 762; [2015] 3 AMR 35 the Court of Appeal set out the established frivolous and vexatious situations, namely, where the application:

(i) is made by a busybody;

(ii) is misguided or misconceived or are trivial complaints of administrative errors;

(iii) is made outside the prescribed time;

(iv) is made against a person or body that is immunised from being impleaded in legal proceedings; and

(v) where there is an alternative remedy or more appropriate remedy.

[12] The second arises when the application is not found to be frivolous and vexatious, leave will nevertheless be refused where an arguable case for further investigation at the substantive stage is not made out. The threshold for this situation is very low. All that is required at this stage is for the judge to peruse the material placed by the applicant before the court, it being an *ex parte* application, to see whether "an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome". Leave of court will be granted unless "absolutely no success may be envisaged".

[13] The third is where the matter for review is not amenable to judicial review. In this situation include matters that are non-justiciable, policy considerations and management prerogative. In this regard, the Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009 said:

> [24] On the 1st question, we are of the view that the decision or exercise of discretion sought to be reviewed under judicial review based on policy consideration or management prerogative may be determined at the leave stage itself. It is not a requirement that the court must only decide on the issue after hearing all the evidence at the substantive motion for judicial review.

[25] As to the 2nd question, the justiciability of such decision is dependent on the particular facts of the case. On the facts of this case, we agree with the Court of Appeal that the issues raised in the notice of motion for leave were not judicially reviewable and hence not justifiable.

Applying The Test

[14] The Attorney General raised the following objections against the granting of leave: (i) the relief prayed for is in the nature of *mandamus* but the basic criteria for *mandamus* is not satisfied; and (ii) sections 135 and 127(3A) of the ITA are not applicable to set aside or exempt unlawful taxes raised against a taxpayer as that power is expressly designated by Parliament to the Special Commissioners of Income Tax ("SCIT") by way of an appeal. After considering arguments of both sides on the above issues including further submissions in the applicant's written submission in reply (encl. 48), it is my considered view that the application for leave is frivolous and vexatious.

[15] First and foremost, it is important to keep in mind that the Minister in the instant case did not exercise his powers or in other words did not make any decision under ss. 135 and/or 127(3A) of the ITA as requested by the applicant in its letter dated 27 July 2021. In the said letter, the applicant required the Minister to give the necessary direction under s. 135 of the ITA, specifically, to review their exercise of powers and functions so that the law is applied correctly and fairly and to exempt the tax raised by the DGIR under s. 127(3A) of the ITA by 30 July 2021, failing which the applicant will assume that the Minister is not considering the request for the said directions or tax exemption.

[16] Secondly, the applicant sought declarations in the form framed as though the Minister had made a decision on the requests made which were, in pith and substance, against the impugned assessments made by the DGIR. The declarations would only be proper against the DGIR and is groundless against the Minister who made no decision. The grounds of review were an all-out assault on the decision of the DGIR. And as the facts in this case shows that leave to commence judicial review proceedings to challenge the decision of the DGIR was dismissed by this court and there was no appeal against that decision. Thus, the only body that was empowered by the Parliament to make the appropriate "directions" against the unlawful and arbitrary exercise of power by the DGIR or to set aside the impugned assessments as being illegal, *ultra vires* and in excess of jurisdiction, as alleged by the applicant is the SCIT by way of an appeal. The applicant's other avenue of judicial review against the DGIR for the order of *certiorari* and/or declarations was already heard and dismissed the High Court.

[17] Since, the Minister did not make any decision, the issue of failing to give any reason does not arise and such a complaint is clearly a "frivolous and vexatious" complaint and an abuse of the process of the court. No success can be envisaged on this ground.

Relief Seeking Order That Minister Exercises Power

[18] Having said that, I will now address the first objection raised by the Attorney General on the issue that the principal order sought was in the nature of *mandamus* which was not available in law to the applicant. The opening words of the principal relied are: "an order for the respondent (Minister) to exercise his power". The power referred to are housed in ss. 135 and 127(3A) of the ITA. The words are compelling words and directed to the Minister to exercise the power in the manner dictated by the applicant. The relief sought, as it is worded, is in pith and substance an order in the nature of *mandamus*. It is certainly not an order for *certiorari* as subsequently submitted by the applicant in the applicant's written submission in reply.

[19] It is trite that an order of *certiorari* is to quash the legal effect of a decision and this is not made out by the words employed in the principal relief sought. What is prayed for is to exercise a power. I have considered the submissions and agree with Federal Counsel who appeared for the Attorney General that what is sought is an order in the nature of *mandamus* which cannot in law be granted on the face of what had been pleaded by the applicant. As such, there is no arguable case for the principal order sought to be investigated at the substantive stage.

[20] The reason the order cannot be granted in law is because *mandamus* does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in a statute. The use of the word 'may' in both the sections confer discretionary power and not a duty on the Minister. For ease of reference the sections are reproduced below. Section 135 of the ITA state:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

while s. 127(3A) of the ITA state:

> The Minister may, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

[21] There is a plethora of authorities on the point and it is sufficient to cite the following instructive extract from MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, at p. 615 (see Court of Appeal decisions of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 and *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* where the same extracts from earlier edition of the book were applied):

> *Mandamus* is thus a very wide remedy which is available against a public officer to see that a duty is performed or carried out, in accordance with law. Enforceable by *mandamus* is a duty of a public nature, the performance of which imperative and not optional or discretionary. Thus, if an officer has power, rather than a duty, and does not use such power, *mandamus* is not issued if the officer refuses to exercise the power for the wrong reasons.

[22] The decision in *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179 is relevant. There an order of *mandamus* was sought directing the Chief Justice to respond to the applicant's request under s. 13 of the Judges' Code of Ethics 2009 to act in the manner dictated by the applicant. It was held that, there must be under the law some duty cast upon the public officer before an order of *mandamus* can be made. If the public officer does not carry out his duty, the court will call upon him to perform that duty by an order of *mandamus*. The court found that s. 13, from the language used, did not impose a duty on the Chief Justice to act in a manner dictated by the applicant. The principle was lucidly stated as follows:

> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, *mandamus* is not issued to compel him to exercise his power.

Whether There Is An Arguable Case For An Order Of Certiorari

[23] As stated above, the applicant subsequently its applicant's written submission in reply submitted that the order sought against the Minister was an order of *certiorari* and not an order of *mandamus*. This submission cannot be correct as shown above. The applicant was seeking the relief as it is framed because the Minister did not respond to the applicant's letter dated 27 July 2021 requesting him to exercise his powers under s. 135 of the ITA and/or s. 127(3A) of the ITA. I had explained above why the relief as prayed by the applicant cannot be granted. The law is trite. An order of *certiorari* is to quash a 'decision' or 'action' of a public body or authority while an order of *mandamus* is a command issued to a public body or authority to perform a public duty mandated by law which it had failed or omitted to do.

[24] Notwithstanding, that *certiorari* was not prayed as a relief, I proceeded to consider the cause papers to determine whether *certiorari* could be sought on the grounds of review and facts that were pleaded by the applicant. The applicant had articulated the point in its applicant's written submission in reply as follows:

> 16. In *Ahli-Ahli Suruhanjaya* (*supra*) the Federal Court adopted the decision in *Council of Civil Service Unions* (*supra*) that a refusal by the decision maker to make a decision can also amount to a decision susceptible to judicial review. In the leading judgment by Raus Sharif FCJ, the court held that:

A [26] It is trite law that the purpose of an order for *certiorari* is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a B decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[27] We adopt the same view. ...

C 21. Based on the decision of our Federal Court in *Ahli-Ahli Suruhanjaya* (*supra*), the Applicant submits that a decision amenable to judicial review can include a purported non-decision such as that in the present matter, so long as the decision affects the aggrieved party either by altering his rights or obligations or by depriving him of the benefits which he has been permitted to enjoy.

D 22. In the present matter, the applicant has expressly stated in its letter dated 27.07.2021 that the failure by the Respondent to respond to the letter, will be treated as a rejection by the Respondent of the Applicant's appeal and that the Applicant shall proceed to commence the necessary legal proceedings on this premise.

E 26. At the outset, the Applicant wishes to highlight that the Applicant had prayed for an order of *certiorari* instead of an order of *mandamus*. The AGC's contention that the prayer sought by the Applicant is in effect a mandamus is without merit.

37. ... The Applicant in the instant case filed an application of judicial F review against the "decision" of the Respondent who did not respond to the Applicant's request to issue a direction under Section 135 of the ITA and/or to exempt the taxes arbitrarily raised *via* the said Assessments under Section 127(3A) of the ITA.

[25] The applicant is therefore relying on the second type of decision stated G in *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 *ie*, there is a "refusal to make a decision". This is clear as in *Council of Civil Service Unions* the decisions susceptible to an order of *certiorari* are one of two types: type one is where the decision-maker has made a decision and type two is where there is a decision refusing to make a decision. It is also clear that a refusal to make a decision is different from a decision rejecting H the requests that were made under ss. 135 and/or 127(3A) of the ITA.

[26] The Minister did not make a decision refusing to make a decision on the said requests. It follows that there is no decision susceptible to *certiorari.* In coming to this conclusion, I had to first decide whether I could consider the relief of *certiorari* when the relief was not expressly pleaded and then I decide whether there was a 'refusal to make a decision' that was susceptible to the remedy of *certiorari*.

[27] In deciding the first question, I kept in mind the established principle that a judge hearing an application for leave under O. 53 of the Rules of Court 2012 has to adopt a flexible approach when determining technical objections (see *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 and *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525). Adopting this approach, I found that grounds had been pleaded in the O. 53 statement (see para. 3) seeking to quash a purported decision of the Minister on illegality and irrationality indicating that the relief of *certiorari* was in contemplation notwithstanding that the relief was not prayed for.

[28] The grounds to quash the purported decision of the Minister have already been alluded to in para. [9] above. Since there are grounds raised for such remedy, I am of the view that the applicant is entitled to contend that it has put forward a case for the relief of *certiorari*. Thus, if the applicants are able to establish an arguable case this court is then in a position to make an order that necessary amendments be made to the cause papers to reflect the correct relief sought.

[29] Now, the grounds stated in the O. 53 statement alleged that the Minister had deemed or purported to have made a decision (as opposed to a refusal to make a decision) on the request of the applicant. It is alleged that the purported decision is riddled with errors and which decision is liable to be quashed on grounds of illegality and irrationality. Herein, the fatal flaw in the applicant's case is exposed.

[30] The incontrovertible facts show, that the Minister did not make any decision and did not reply to the applicant's letter. There is therefore no nexus between the grounds raised in the O. 53 statement and the relief of *certiorari*, given the fact that the Minister as decision-maker did not make a decision. The grounds the applicant raised in the O. 53 statement seeks to quash a fictitious decision or a non-existing decision. As such, no arguable case for investigation at the substantive stage is made out and the application is one which is in essence frivolous and vexatious.

[31] The second question was whether there was a decision by the Minister refusing to make a decision (as opposed to making a decision). The decision by a decision-maker refusing to make a decision is susceptible to an order of *certiorari* (decision in the second sense enunciated in *Council of Civil Service Unions*. In the instant case, the Minister did not reply to the applicant's letter where it was sought for the Minister to exercise his powers under ss. 135 or 127(3A) of the ITA in the manner dictated by the applicant.

[32] The principles in respect of a 'refusal to make a decision' were established in *Re Bukit Sembawang Rubber Co Ltd & Sembawang Estates Ltd* [1961] 1 LNS 102; [1961] 1 MLJ 269 and followed in *Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi* [2015] 9 CLJ 110. The principles can be summarised as follows:

A (i) a refusal to make a decision may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply; and

B (ii) there must be clear evidence of a refusal to act. This can be established primarily on the basis of an inordinately long delay as to amount to a refusal to consider and determine the application made to the decision-maker (*R v. Central Professional Committee for Opticians* [1949] 2 All ER 519).

C **[33]** In my judgment, based on the facts alluded to by the applicants, there was no inordinate delay as the letter seeking directions and tax exemption was dated 27 July 2021. The judicial review application was filed on 17 August 2021. This time frame does not evince an inordinate delay. The Minister was being asked to review what the DGIR had done and to issue directions and exempt taxes.

D **[34]** For completeness, even if there is a decision that qualifies as a 'refusal to make a decision' that is susceptible to *certiorari* what can be quashed, if at all, is merely the decision refusing to make a decision. The case of *Zainal Hj Nasiruddin v. The Registrar Of Societies* [2012] 1 LNS 939; [2012] MLJU 1623 is instructive. There the applicant made an application to the Registrar E of Societies ("Registrar") to register a political party. The Registrar did not make any decision either to refuse or to allow the application. It was held that an inordinate delay, without good reason, to make a decision amounted to a 'refusal to make a decision'. Ravinthran J (as His Lordship then was) held that such inordinate delay was unlawful and *ultra vires* the Societies Act F 1966 but to compel the Registrar to register the political would be putting the cart before the horse as the Registrar has not made any decision as yet. An order of *mandamus* to compel the Registrar to make a decision whether to register the political party or not to register the political party within 21 days of the order was made by His Lordship.

G **[35]** Thus, an application to quash a decision by a decision-maker not to make a decision must be accompanied by an order of *mandamus* to compel the decision-maker to make a decision on the matter as mandated by the Parliament. The court cannot usurp this power. In the instant case, the power is conferred on the Minister. Without the accompanying order of *mandamus*, H the applicant is only left with 'no decision made by the decision-maker'.

[36] Similarly, in the instant case, if the decision not to make a decision *ie*, decision not to exercise powers under ss. 135 and/or 127(3A) of the ITA, is quashed, an order of *mandamus* to compel the Minister to exercise his powers must follow. However, as shown above an order of *mandamus* cannot I be made as ss. 135 and 127(3A) of the ITA confers discretionary power and not a duty on the Minister. The non-applicability of ss. 135 and 127(3A) of the ITA.

[37] This is an additional ground to refuse leave on the premise that the application is frivolous and vexatious. Again, it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicants' requests; and (ii) that the assessments made by the DGIR are alleged to be illegal and/or unlawful *ie*, the tax cannot be levied in law. The applicants came to the Minister to set aside the assessments made by the DGIR by way of directions to be given to the DGIR to set aside the same or the Minister himself exempt the tax as assessed by the DGIR.

[38] In my view, the Minister has no power to do what the applicant are requesting him to do under ss. 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for *ie*, *mandamus*, *certiorari* and declaration on the material presented to this court. My reasons are as follows.

[39] The ITA is structurally designed and is divided into parts and chapters to take care of specific areas. The power to set aside any wrongful assessments in law lies with the SCIT by way of an appeal under s. 99 of the ITA or in certain instances by the High court by way of judicial review if special circumstances are shown. Sections 99 to 102 is in Chapter 2 under Part VI of the ITA which specifically provide for 'assessments and appeals'. The appeals envisaged in the sections are expressly directed against assessments made by the DGIR. The SCIT are conferred with express power under para. 26 of Schedule 5 of the ITA to discharge or set aside or amend any assessments made by the DGIR. An appeal against the decision of the SCIT lie to the High Court (s. 102 read with para. 34 of Schedule 5 of the ITA).

[40] Section 135 of the ITA is housed in Chapter 1 under Part X which solely concerns 'administration'. The purpose of the provision is for the Minister, when he is of the view it is required, to give directions of a general character as to the exercise of the functions of the DGIR, not inconsistent with provisions of the ITA, to the DGIR. The directions are administrative and general in nature and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments he had made in a particular case. Setting aside an assessment is not a matter concerning 'administration' falling within the purview of s. 135 of the ITA. The power to set aside an assessment is provided only by way of an appeal to the SCIT and not the Minister.

[41] Section 127(3A) of the ITA specifically confers power on the Minister to grant tax exemptions. The section is in Part IX of the ITA which concerns exemptions, remission and other relief. Section 127(3A) of the ITA is an empowering provision conferring power on the Minister to exempt a person from 'any provision' of the ITA or exempt 'any income of a particular kind or any class of income of a particular kind'. The section envisages that the person requesting exemption is lawfully liable to pay tax. But, in the instant

case, what was sought to be exempted was tax that should not have been levied since it is the applicants pleaded case was that tax was illegally, arbitrarily and/or wrongfully assessed in law.

[42] It is basic law that 'income tax is a tax on income' and 'exemption only becomes relevant when there is chargeable income, but not otherwise'. This principle was reiterated in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518 by the Court of Appeal referring to, amongst others, *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 where it was held that a tax exemption is only given after liability to tax has been determined in the following words:

> In other words, there must liability to income tax first and then only the question of claiming exemption ... arises.

[43] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the SCIT. As such, s. 127(3A) of the ITA is only applicable where there is liability to pay lawfully assessed tax. Therefore, the exemption sought in the instant case is something that the Minister has no power of doing.

[44] For the above reasons, there can be no arguable case given that s. 135 of the ITA does not envisage the Minister giving directions to the DGIR to set aside the assessments (which under the provisions of the ITA is expressly within the jurisdiction of the Special Commissioners or the High Court) and that s. 127(3A) of the ITA do not envisage granting exemptions in respect of illegal and/or unlawful tax. Since there, is no power to do what is requested of the Minister, there is no basis to seek the declarations sought against the Minister. There is no arguable case for further investigation at the substantive stage.

Leave Allowed In Earlier Applications By The High Court

Conclusion

[45] It was submitted that exactly the same applications for leave had been allowed by the High Court and in one of those cases *ie*, *Peguam Negara v. CMMT Investment Limited* (Civil Appeal No. W-01(IM)-575-10-2021) the decision of the High Court was upheld by the Court of Appeal. It suffices to say that the said cases are distinguishable on the admitted fact that the specific issues that arose for consideration in this case was not the subject matter of any of those cases. For the foregoing reasons the application for leave was dismissed.